FILE COPY

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 682.

THE NORWICH PHARMACAL COMPANY,

Petitioner,

against

STERLING DRUG, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN T. CAHILL,
JAMES A. FOWLER, JR.,
63 Wall Street,
New York 5, N. Y.
Attorneys for Respondent.

DAVID RASCH,
JAMES S. KERNAN, JR.,
RAYMOND L. FALLS, JR.,
Of Counsel

March 3, 1960.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
Development of upset stomach remedies	2
Respondent's decision to compete	4
"It stretches credulity to imagine a purchaser confusing these disparate articles"	5
The decision of the District Court	6
The decision of the Court of Appeals	7
ARGUMENT	9
I.—The Court of Appeals recognized that the New York law was applicable and applied that law	9
II. The Court of Appeals correctly applied the New York law	14
III. There was no deviation from the requirements of Rule 52	19
CONCLUSION	21
APPENDIX:	
Opinion of U. S. Court of Appeals in *Speedry Products, Inc.* v. *Dri Mark Products, Inc.*, 271 F. 2d 646 (2d Cir. 1959)	A-1

Table of Authorities.

Cases.

	PAGE
American Safety Table Co. v. Schreiber, 269 F. 2d 255 (2d Cir. 1959), *cert. denied*, 361 U. S. 915 (1959)	11
Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U. S. 525 (1958), *rehearing denied*, 357 U. S. 933	14
Campbell Soup Co. v. Armour & Co., 175 F. 2d 795 (3d Cir. 1949), *cert. denied*, 338 U. S. 847	20
Charles D. Briddell, Inc. v. Alglobe Trading Corp., 194 F. 2d 416 (2d Cir. 1952)	12, 13
Continental Casualty Co. v. Beardsley, 151 F. Supp. 28 (S. D. N. Y. 1957), *aff'd*, 253 F. 2d 702 (2d Cir. 1958), *cert. denied*, 358 U. S. 816	12, 15
Crescent Tool Co. v. Kilborn & Bishop Co., 247 Fed. 299 (2d Cir. 1917)	13
Electrolux Corp. v. Val-Worth, Inc., 6 N. Y. 2d 556, 161 N. E. 2d 197 (1959)	17
Family Doctor Plan v. Group Health Insurance, Inc., 148 N. Y. S. 2d 779 (Sup. Ct. Bronx Co. 1956)	18
Germanow v. Standard Unbreakable Watch Crystals, Inc., 283 N. Y. 1, 27 N. E. 2d 212 (1940)	15
Herzman Scarfs, Inc. v. Baar & Beards, Inc., 203 Misc. 449, 118 N. Y. S. 2d 380 (1952)	13
Hotel Syracuse, Inc. v. Motel Syracuse, Inc., 283 App. Div. 182, 127 N. Y. S. 2d 485 (4th Dep't 1954), *aff'd*, 309 N. Y. 831, 130 N. E. 2d 620 (1955)	16, 18
International News Service v. Associated Press, 248 U. S. 215 (1918)	12, 14
Kellogg Co. v. National Biscuit Co., 305 U. S. 111 (1938), *rehearing denied*, 305 U. S. 674	16
Lehmann v. Acheson, 206 F. 2d 592 (3d Cir. 1953)	21

PAGE

Litwin v. *Maddux*, 7 Misc. 2d 750, 164 N. Y. S. 2d 489 (Sup. Ct. Queens Co. 1957) 13, 16, 18

Lucien Lelong, Inc. v. *Lander Co.*, 164 F. 2d 395 (2d Cir. 1947) 13

Maternally Yours v. *Your Maternity Shop*, 234 F. 2d 538 (2d Cir. 1956) 11

Marco Inc. v. *Hampden Sales Association*, 273 App. Div. 297, 77 N. Y. S. 2d 510 (1st Dep't 1948) 13, 16

Pharmaceuticals, Inc. v. *United Whelan Corp.*, 123 U. S. P. Q. 565 (Sup. Ct. N. Y. Co. 1959) 18

Pocket Books, Inc. v. *Meyers*, 292 N. Y. 58, 54 N. E. 2d 6 (1944) 16, 17

Raenore Novelties, Inc. v. *Superb Stitching Co.*, 47 N. Y. S. 2d 831 (Sup. Ct. N. Y. Co. 1944) 15

Ragan v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949) 14

RCA Mfg. Co. v. *Whiteman*, 114 F. 2d 86 (2d Cir. 1940) 15

Regent-Sheffield, Ltd. v. *Reo Products Mfg. Corp.*, 18 Misc. 2d 321, 187 N. Y. S. 2d 540 (Sup. Ct. N. Y. Co. 1959) 16

Robert Simmons, Inc. v. *Simmons King, Inc.*, 10 Misc. 2d 812, 173 N. Y. S. 2d 95 (Sup. Ct. N. Y. Co. 1958) 13, 16, 17, 18

Santa's Workshop, Inc. v. *Sterling*, 282 App. Div. 328 (3d Dep't 1953) 17, 18

Santa's Workshop, Inc. v. *Sterling*, 2 App. Div. 2d 262 (3d Dep't 1956), *aff'd*, 3 N. Y. 2d 757 (1957) 17, 18

Speedry Products, Inc. v. *Dri Mark Products, Inc.*, 271 F. 2d 646 (2d Cir. 1959) 10, 15, 18

Stevenot v. *Norberg*, 210 F. 2d 615 (9th Cir. 1954) 21

The Upjohn Company v. *Schwartz*, 246 F. 2d 254 (2d Cir. 1957) 10

United States v. *United States Gypsum Co.*, 333 U. S. 364 (1948) 21

Other Authorities.

PAGE

3 Callman, *Unfair Competition and Trade-Marks*, 1105 (2d ed. 1950) 20

Restatement of Torts, §742 (1938 ed.) 20

3 *Restatement of Torts* 622 (1938 ed.) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 682

THE NORWICH PHARMACAL COMPANY,

Petitioner,

against

STERLING DRUG, INC.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the District Court for the Northern District of New York (R. 660-70) is printed in the Appendix to the Petition herein (App. 1-15).* That opinion is reported at 167 F. Supp. 427.

The opinion of the Court of Appeals for the Second Circuit (R. 676-83), also printed in the Appendix to the Petition (App. 16-24), is reported at 271 F. 2d 569.

* References in this brief in the form "R. " are to pages of the Joint Appendix printed for the use of the Court below and filed as the record herein; references in the form "App. " are to the appendix annexed to the Petition; references in the form "R. App. " are to the appendix annexed to this brief.

Jurisdiction.

Jurisdiction is invoked by petitioner under 28 U. S. C. 1254(1).

Question Presented.

Although the Petition purports to present four questions to this Court, there is in fact a single question at issue. That question is:

> Under the law of New York, was petitioner entitled to enjoin respondent's use of the color pink in a stomach remedy without proving either that this color, as used in its own product, had acquired a secondary meaning or that there was any likelihood of confusion between the two products?

Statement of the Case.

The facts are substantially undisputed and were not the subject of any significant difference between the Court of Appeals and the District Court.

Both petitioner and respondent are large and successful companies and have engaged for many years in the business of marketing proprietary drug products.

Development of upset stomach remedies.

Doctors have long prescribed as upset stomach remedies mixtures containing as active ingredients bismuth subsalicylate, salol, zinc phenolsulphonate and methyl salicylate (oil of wintergreen) (R. 304-05, 309, 241, 274). These ingredients were unpalatable in powder form and were ordinarily mixed with a liquid, usually elixir lactated pepsin, a red liquid listed in the National Formulary (a standard pharmaceutical reference book) (R. 241-43, 247-48).

When these white powders were mixed with the red liquid, they produced a pink color of pleasing appearance (R. 242-44). Pink thus became the traditional and preferred color for such remedies (R. 305-06, 433).

Several proprietary drug companies, including petitioner, marketed a pink upset stomach remedy, having substantially these ingredients, early in this century (R. 433-34, 469-70, 483). One third-party witness testified that a product of this kind had been marketed "probably a hundred years ago" (R. 418-19). Over the years many companies marketed similar products, including some of the large drug chains:

> Rexall-Liggett, a very large drug chain with about 10,000 retail drug stores, put out its own brand about 1930 (R. 493).
>
> The Walgreen Company, with about 2,100 retail drug stores located all over the country, began marketing its own brand in 1939 (R. 504-06).

A striking omission in petitioner's statement of facts is the failure to mention or discuss the 33 pink stomach remedies of this same character which were put in evidence at the trial (R. 313-31). All of these remedies served the same medical purpose (R. 313-31).

All 33 of these stomach remedies had the same pink color.

29 out of the 33 had substantially the same three principal ingredients.

24 had the same wintergreen flavor.

19 carried the same "upset stomach" slogan.

The Court of Appeals was impressed with the significance of these 33 exhibits. The court said:

> "It is * * * worth noting that evidence was introduced to show the existence, past or present, of at least 33

other pink upset stomach remedies. Assuming, as contended, that these products have enjoyed limited commercial success, they at least serve to demonstrate plaintiff's heavy burden in proving the exclusive public association of pink and Pepto-Bismol" (App. 23, note 9).

Petitioner first began to advertise Pepto-Bismol about 1934 (R. 50) and in that year it spent $213 for that purpose (Pl. Ex. 3, R. 59 and 544). By dint of extensive advertising and promotion since that time petitioner, in spite of the lack of novelty of its product, has been able to make Pepto-Bismol by far the largest selling of the pink stomach remedies, to a large degree monopolizing the market for this type of product. In 1955 the sales of Pepto-Bismol in the United States amounted to some $7,600,000 (R. 61).

Respondent's decision to compete.

In 1955 respondent decided to compete with petitioner in this field. This decision was preceded by several market checks to determine what the sales of Pepto-Bismol were (R. 171-72, 177-78, 349). Respondent also secured some information, in no way confidential, as to petitioner's trade discount policy (R. 222). Petitioner characterizes these inquiries as "a series of surveys" and a "probe into Pepto-Bismol's sales and pricing policies" (Pet., pp. 9-10). The record reveals the extent of the exaggeration implied in those phrases.

In developing a product to compete with Pepto-Bismol, respondent used the same active ingredients and pink color, which had long been in the public domain (R. 309-10, 289-90). Respondent adopted, however, a packaging for its product which was entirely dissimilar from Pepto-Bismol.

"It stretches credulity to imagine a purchaser confusing these disparate articles."

The District Court made no finding as to the likelihood of confusion, and in fact made detailed findings with respect to the disparities between the packaging of the two products (App. 5, 7). The Court of Appeals spoke in no uncertain terms on this point. Looking at the bottles, the court discussed the differences in packaging as follows:

> "Defendant's finished product is quite dissimilar from that of plaintiff, not only in most of the details, e.g., shape of the bottle, color of the label and appearance of the cap, but also in the overall effect upon the observer" (App. 20).

The Court particularly emphasized the differences in labeling:

> "To the prospective purchaser the names on both bottles are in type large enough to be distinguishable at a reading distance of over twenty feet. The label covers most of the bottle. Pepto-Bismol's label is yellow with large red letters; Pepsamar's is white with even larger blue letters" (App. 20-21).

The court concluded:

> "Indeed, it stretches credulity to imagine a purchaser confusing these disparate articles" (App. 21).

"Pepsamar", the name chosen for respondent's product, was a name which had previously been registered by one of its subsidiaries as a trademark for use in foreign trade on another type of stomach medicine (Pl. Ex. 2, R. 31 and 542). That name had only one thing in common with "Pepto-Bismol", the syllable "Pep", which has frequently been used for digestive remedies. Defendant's Exhibit AQ shows that there are at least 122 names in the pharmaceutical and

related fields beginning with the syllable "Pep" (R. 364 and 644-57). Of these, 20 are used for upset stomach remedies and six were so used before Norwich's adoption of the name Pepto-Bismol in 1919 (*Ibid.*). The word "peptic" is defined in Webster's Dictionary as follows:

> "Pertaining to digestion; promoting or aiding digestion; digestive; as *peptic* sauces."

Each of the names, "Pepto-Bismol" and "Pepsamar", was broken on two lines on the label of the bottle. This was done in order to place the name on the small bottle in letters large enough to be readable at several feet (R. 351-52). This is necessary in marketing products which are displayed to the public on shelves in drug stores and supermarkets (R. 350-51). It would be absurd to suggest that, because petitioner had used large letters, respondent was required to use small ones.

Petitioner refers to other functional similarities between the two products, such as viscosity and pH, or degree of acidity (Pet., p. 11). It is also absurd to suggest that one maker can monopolize the proper thickness or acidity of a stomach remedy.

Both products carry the legend "For Upset Stomach". This is a common expression frequently used on stomach medicines either in liquid or tablet form (R. 53). It was used on 19 of the other pink products placed in evidence by respondent.

The decision of the District Court.

The District Court enjoined respondent from using the color pink in its stomach remedy unless the color was concealed by an opaque or colored glass bottle. The injunction also forbade respondent from any mention of the color pink in its advertising.

The District Court decided that, even though petitioner's product was not patented but was in the public domain, the petitioner was entitled to an injunction merely because respondent had intentionally copied it. The District Court held that a showing of secondary meaning was not required (App. 13). The District Court held also that petitioner was not required to show likelihood of confusion, but rather, that the burden was on respondent to show that there was no such likelihood. (*Ibid.*)

The District Court concluded further that the pink color was non-functional.

The District Court made no formal findings of fact but stated that the opinion would constitute the findings of fact and conclusions of law in accordance with Rule 52 (App. 15).

The decision of the Court of Appeals.

The Court of Appeals reversed. It concluded that, under the New York cases, plaintiff was required to establish a secondary meaning. It also concluded that the pink color was functional. Either of these conclusions required reversal of the judgment of the District Court.

In discussing the requirement of secondary meaning, the Court of Appeals reviewed the New York authorities and concluded that the New York courts will dispense with that requirement only where certain predatory practices are established. The court continued:

> "the first comer may prevail if he proves secondary meaning plus likelihood of confusion on the one hand or that the second comer has indulged in one of the proscribed practices which equity will enjoin, on the other. The facts here neatly illustrate application of this rule.
>
> "Plaintiff, while correctly asserting that proof of secondary meaning is not always a prerequisite to

> securing relief, must fit its case into one of t remaining categories. This it fails to do" (App. 2

After holding that a showing of secondary meani was necessary, the court further held that no secondar meaning had been proved. The court pointed out tha petitioner's effort to establish secondary meaning reste entirely on a public opinion survey which proved "n more than the popularity of Pepto-Bismol" (App. 2 Apparently petitioner does not now challenge this aspe of the decision of the Court of Appeals.

In rejecting the District Court's conclusion that th pink color was non-functional, the Court of Appeals said:

> "this conclusory finding rests upon too narrow a foundation. The function of a remedy 'For Upse Stomach' is to quiet the upset. Hence, althoug the court found 'that the pink color and the ingredi ents producing same have no healing value in them selves,' yet it recognized that the pink color wa 'designed to present a pleasing appearance to th customer and to the sufferer.' From the court's premise that 'a disordered stomach will accept that which is pleasing and reject that which is repulsive,' a finding of functional value might well be made because a rejected stomach medicine scarcely has a fair opportunity to fulfill its function" (App. 22).

The court continued in a footnote:

> "It is not necessary, however, to decide whether the pink color, because of its purported psycho somatic effect, has a therapeutic value in upset stomach medicines. Cf., the broad definition of 'functional' in the Restatement of Torts, Sec. 742 (1938)" (App. 22, note 7).

Argument.

The Court of Appeals carefully applied the applicable state law. Petitioner merely disagrees with the conclusion of the Court of Appeals as to what the New York cases hold. The Court of Appeals' application of the New York law was correct and is fully supported by the New York authorities.

Nor did the Court of Appeals reject any finding of fact made by the District Court. Rather, it disagreed with the lower court as to the legal effect of those facts.

I.

The Court of Appeals recognized that the New York law was applicable and applied that law.

Petitioner claims that the decision "brings out into the open" a "conflict" between the unfair competition law enforced in the Second Circuit and that enforced in the state courts in New York (Pet., p. 28). Petitioner charges that since "this conflict has been brought out into the open" this Court must "take a hand". Petitioner asks this Court to compel the Court of Appeals "to give up its practice of ignoring the New York law of unfair competition . . ." (Pet., p. 29).

There is no such "conflict" and no such "practice of ignoring the New York law." Petitioner has resorted to this diatribe as a rhetorical device.

The Court of Appeals explicitly recognized the applicability of the New York law when it pointed out in a footnote in its opinion in this case that:

> "As this is purely a diversity suit and as the parties maintain their principal places of business

> in New York, it is fair to assume that New York law applies, despite the multi-state ramifications of unfair competition" (App. 18, note 2).

Annexed as an appendix to this brief is another opinion written by Judge Moore for the Court of Appeals at the same time as the decision in the present case. *Speedry Products, Inc.* v. *Dri Mark Products, Inc.*, 271 F. 2d 646 (2d Cir. 1959). That decision was handed down on Friday, November 6, 1959 and the decision in the present case on Monday, November 9. The plaintiffs in both cases made the same argument—that the New York courts no longer require that plaintiff establish a secondary meaning. The Court of Appeals rejected this argument in both cases. In the *Speedry* case, Judge Moore carefully analyzed and classified the recent New York decisions. The two opinions may be read together as expressing the views of the Court of Appeals on this subject. Taken together, the opinions nicely illustrate the Court's careful attention to the New York law of unfair competition.

The Court of Appeals has frequently and consistently recognized that New York law applies in cases like this one. For example, in its recent decision in *The Upjohn Company* v. *Schwartz*, 246 F. 2d 254 (2d Cir. 1957), the court pointed out that:

> "To the causes of action for unfair competition, where jurisdiction is based upon diversity of citizenship, this appellate court will apply the law of New York, the State in which the acts of unfair competition were committed." (p. 257, note 3).

Indeed, the parties have been in agreement that the New York law governs the decision in this case. No one has ever suggested the contrary. Both parties looked both to the state cases and to the federal cases in determining what

the New York law was. In fact, in the Court of Appeals respondent pointed out that the New York law governed the burden of proof, as well as the other issues. Petitioner relied entirely on federal cases in arguing this point.

Petitioner suggests, however, that in spite of the parties' agreement that New York law was applicable and in spite of the Court of Appeals' own explicit recognition that the case was governed by New York law, the court nevertheless captiously refused to apply that law in arriving at its decision. Petitioner purports to derive this suggestion from the fact that the Court of Appeals cited more federal than state cases in its opinion. Petitioner further argues that these federal cases represent a line of authority parallel, but unrelated, to the New York authorities.

There is no substance to petitioner's suggestion.

First of all, the law of unfair competition in New York has not developed independently of the federal authorities. The history of the New York law of unfair competition has been a history of interplay and cross-fertilization between the state and federal decisions.

As the Court of Appeals pointed out in *Maternally Yours* v. *Your Maternity Shop*, 234 F. 2d 538 (2d Cir. 1956):

> "The practice in this Circuit, until very recently, has been to ignore the usually theoretical question of what law governs and to draw precedents from both federal and state (usually New York) courts." (p. 540, note 1).

And in *American Safety Table Co.* v. *Schreiber*, 269 F. 2d 255 (2d Cir. 1959), *cert. denied*, 361 U. S. 915 (1959), the court pointed out that:

> "State courts very generally consult the entire body of law in this field * * *." (p. 270).

Referring to the practice of the New York courts, the Court of Appeals said:

> "the New York courts commonly refer to federal cases." (p. 270, note 4)

The court went on to cite eight decisions by the New York Court of Appeals illustrating this point (*Ibid.*).

Much unfair competition litigation is in the federal courts, either because of diversity of citizenship or because it also involves trade-mark or patent claims. The state courts have not foreclosed themselves from this body of authority and there is no reason why a federal court should do so.

Petitioner's suggestion of independently developed bodies of state and federal law in this area is obviously groundless. There is some irony in the fact that Norwich's principal reliance, even now, is not on a state decision but on this Court's decision in *International News Service* v. *Associated Press*, 248 U. S. 215 (1918) (Pet., pp. 25, 28).

Petitioner's argument also ignores the fact that the federal cases on which the Court of Appeals relied were cases which themselves construed and applied New York law. For example, in pointing out that there had been "no violation of plaintiff's property rights," the court cited Judge Palmieri's "thorough analysis of the misappropriation cases" in *Continental Casualty Co.* v. *Beardsley*, 151 F. Supp. 28, 43-45 (S. D. N. Y. 1957), *aff'd*, 253 F. 2d 702 (2d Cir. 1958), *cert. denied*, 358 U. S. 816. In the *Beardsley* case Judge Palmieri discussed virtually all of the New York cases on which petitioner now relies and concluded that they failed to support the kind of argument which petitioner makes.

Petitioner condemns the Court of Appeals for relying on its own prior decisions in *Charles D. Briddell, Inc.* v.

Alglobe Trading Corp., 194 F. 2d 416 (2d Cir. 1952), and *Crescent Tool Co.* v. *Kilborn & Bishop Co.*, 247 Fed. 299 (2d Cir. 1917). Petitioner refers deprecatingly to the "'free ride' doctrine" of the *Briddell case* (Pet., p. 18) and the "rigidities" of the *Crescent Tool* case (Pet., p. 28).

The New York courts have not found these decisions incompatible with their own views. In *Herzman Scarfs, Inc.* v. *Baar & Beards, Inc.*, 203 Misc. 449, 118 N. Y. S. 2d 380 (1952), for example, the Supreme Court for New York County paraphrased the language of the federal cases and relied on both the *Briddell* and the *Crescent Tool* cases. Indeed, Judge Learned Hand's decision in *Crescent Tool* lies at the basis of much of the New York law of unfair competition and has been consistently cited and relied on in the recent New York decisions. Among the many recent New York cases relying on that decision are the following: *Marco Inc.* v. *Hampden Sales Association*, 273 App. Div. 297, 302, 77 N. Y. S. 2d 510, 515 (1st Dep't 1948); *Robert Simmons, Inc.* v. *Simmons King, Inc.*, 10 Misc. 2d 812, 814, 173 N. Y. S. 2d 95, 97 (Sup. Ct. N. Y. Co. 1958); *Litwin* v. *Maddux*, 7 Misc. 2d 750, 759-60, 164 N. Y. S. 2d 489, 499 (Sup. Ct. Queens Co. 1957). In the *Simmons* case the court pointed out that:

> "Free enterprise and the public interest in competition stand as a barrier to plaintiff's claim to a color scheme monopoly . . ."

and cited the *Crescent Tool* case for that proposition (10 Misc. 2d at 814, 173 N. Y. S. 2d at 97). In the *Marco* case the court relied both on *Crescent Tool* and on *Lucien Lelong, Inc.* v. *Lander Co.*, 164 F. 2d 395 (2d Cir. 1947), cited by the Court of Appeals in its opinion in this case (App. 19), in holding that plaintiff was not entitled to the exclusive use of a particular design unless he could establish secondary meaning.

It is perfectly apparent that the Court of Appeals fully recognized that the law of New York governed. It is equally apparent that the Court of Appeals determined what the New York law was in the same manner as a New York court would, that is, by examining the relevant New York and federal cases.

It is submitted that there is nothing in this case which makes it appropriate for this Court to reexamine the application made by the Court of Appeals of the New York law of unfair competition. This Court has often emphasized its deference to the Courts of Appeals in matters of local law. *E.g., Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525, 529-30 (1958), *rehearing denied*, 357 U. S. 933; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 534 (1949).

II.

The Court of Appeals correctly applied the New York law.

The Court of Appeals looked to and applied the state law in this case. The only remaining question is whether the court's application of that law was correct.

Petitioner suggests that the Court of Appeals failed to reach the result which would have been reached by a New York court. Petitioner contends that a New York court would have given a broad scope to the decision of this Court in *International News Service* v. *Associated Press*, 248 U. S. 215 (1918), and would have granted petitioner an injunction without proof that the pink color of its product had acquired a secondary meaning.

It may be noted, first, that the New York courts, no less than the federal courts, have recognized the limitations on

the principle of the *Associated Press* decision. In *Germanow* v. *Standard Unbreakable Watch Crystals, Inc.*, 283 N. Y. 1, 18-19, 27 N. E. 2d 212, 219 (1940), the New York Court of Appeals pointed out the extent to which the *Associated Press* decision turned on the peculiar facts of that case. Similarly, in *Raenore Novelties, Inc.* v. *Superb Stitching Co.*, 47 N. Y. S. 2d 831 (Sup. Ct. N. Y. Co. 1944), the court pointed out that the *Associated Press* case "can only be interpreted in relation to its own facts," citing the *Germanow* decision and Judge Hand's opinion in *RCA Mfg. Co.* v. *Whiteman*, 114 F. 2d 86 (2d Cir. 1940) (47 N. Y. S. 2d at 832-33). The court quoted with approval Judge Hand's comment that the *Associated Press* decision "cannot be used as a cover to prevent competitors from ever appropriating the results of the industry, skill, and expense of others." (47 N. Y. S. 2d at 833).

There are, of course, some New York cases which allow recovery for unfair competition where "palming off" is not involved and where "secondary meaning" is not proved. These cases were analyzed by the Court of Appeals in this case and in *Speedry Products, Inc.* v. *Dri Mark Products, Inc.*, *supra*, and by Judge Palmieri in *Continental Casualty Co.* v. *Beardsley*, 151 F. Supp. 28 (S. D. N. Y. 1957), *aff'd*, 253 F. 2d 702 (2d Cir. 1958), *cert. denied*, 358 U. S. 876. Those analyses make it clear that such recovery will be allowed only when facts exist of a kind not present in our instant case. As the Court of Appeals said in its opinion, the New York cases have allowed recovery without proof of secondary meaning only when certain "predatory practices" are established (App. 19).

No useful purpose would be served by repeating here the careful analysis made by the Court of Appeals and by Judge Palmieri. A few citations will illustrate the New

York courts' persistent requirement of a showing of secondary meaning where plaintiff alleges that features of his product have been copied.

In *Mavco Inc.* v. *Hampden Sales Association*, 273 App. Div. 297, 77 N. Y. S. 2d 510 (1st Dep't 1948), the plaintiff manufactured and sold a ladies' compact made of plastic and molded in the form of a jewel. Defendant purchased one of plaintiff's compacts on the market and, using it as a model, marketed a compact substantially the same in appearance. The court held the plaintiff could not recover without showing secondary meaning and that no secondary meaning had been proved. To the same effect are *Pocket Books, Inc.* v. *Meyers*, 292 N. Y. 58, 54 N. E. 2d 6 (1944); *Hotel Syracuse, Inc.* v. *Motel Syracuse, Inc.*, 283 App. Div. 182, 127 N. Y. S. 2d 483 (4th Dep't 1954), *aff'd*, 309 N. Y. 831, 130 N. E. 2d 620 (1955); *Regent-Sheffield, Ltd.* v. *Reo Products Mfg. Corp.*, 18 Misc. 2d 321, 187 N. Y. S. 2d 540 (Sup. Ct. N. Y. Co. 1959); *Robert Simmons, Inc.* v. *Simmons King, Inc.*, 10 Misc. 2d 812, 173 N. Y. S. 2d 95 (Sup. Ct. N. Y. Co. 1958); *Litwin* v. *Maddux*, 7 Misc. 2d 750, 164 N. Y. S. 2d 489 (Sup. Ct. Queens Co. 1957).

The New York courts have consistently recognized the principle stated by this Court in *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111 (1938), *rehearing denied*, 305 U. S. 674, when it said:

> "Sharing in the goodwill of an article unprotected by patent or trademark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested" (p. 122).

For example, in *Mavco Inc.* v. *Hampden Sales Association*, *supra*, the court explained the decisions in a number of leading cases, on which it relied, as

> ". . . based on an aversion to granting a monopoly to anyone who was unable to secure a patent or statutory trademark unless it clearly appeared that the public would be deceived as to the article it was purchasing or its origin" (273 App. Div. at 304-05, 77 N. Y. S. 2d at 517-18).

See also *Pocket Books, Inc.* v. *Meyers, supra*; *Robert Simmons, Inc.* v. *Simmons King, Inc., supra*; 3 *Restatement of Torts* 622 (1938 ed.).

The cases on which petitioner relies are illustrative of the proposition that proof of certain kinds of predatory practices will establish a cause of action for unfair competition. They in no way suggest that secondary meaning and likelihood of confusion need not be shown where plaintiff complains of product copying.

In *Electrolux Corp.* v. *Val-Worth, Inc.*, 6 N. Y. 2d 556, 161 N. E. 2d 197 (1959), relied on by petitioner (Pet., p. 26), the plaintiff, manufacturer of Electrolux vacuum cleaners, complained of defendant's use of its product in a "bait and switch" advertising scheme. It was proved that defendant advertised rebuilt Electrolux machines in order to gain admittance to people's homes, but then disparaged the Electrolux machines in order to sell another and more expensive product. The court held that this course of conduct, taken in its entirety, was "deceptive and harmful to the public interest" (6 N. Y. 2d at 569) and that it was actionable.

Petitioner relies particularly, as did the District Court, on the decisions in *Santa's Workshop, Inc.* v. *Sterling*, 282 App. Div. 328 (3d Dep't 1953), and 2 App. Div. 2d 262 (3d Dep't 1956), *aff'd*, 3 N. Y. 2d 757 (1957). That case involved a very unusual set of facts, a widely advertised tourist attraction in the Adirondacks, and did not involve any marketing of competive products. The opinion did not purport to upset or even discuss the decided cases in this field.

It is sufficient to refer to the Court of Appeals' careful analysis of the *Santa's Workshop* case in *Speedry Products, Inc.* v. *Dri Mark Products, Inc., supra.* The court pointed out that

> "The decision • • • in favor of the plaintiff in that case could easily have been grounded on a finding that secondary meaning had been quickly acquired. In any event the facts clearly demonstrate the type of predatory business conduct that a court of equity will enjoin whether or not there has been a showing of secondary meaning" (271 F. 2d at 650) (R. App. 6).

The court commented further that:

> "The facts showed such an obvious theft of the plaintiff's business ideas, physical layout and advertising that the fraudulent nature of the defendant's competition was most apparent" (271 F. 2d at 649) (R. App. 5).

Recent cases decided by the New York courts have refused to give to the *Santa's Workshop* case the meaning ascribed to it by petitioner. *Family Doctor Plan* v. *Group Health Insurance, Inc.*, 148 N. Y. S. 2d 779 (Sup. Ct. Bronx Co. 1956). The New York courts have continued to apply the secondary meaning requirement, just as they always did. *Hotel Syracuse, Inc.* v. *Motel Syracuse, Inc.*, 283 App. Div. 182, 127 N. Y. S. 2d 485 (4th Dep't 1954), *aff'd*, 309 N. Y. 831, 130 N. E. 2d 620 (1955) *Robert Simmons, Inc.* v. *Simmons King, Inc., supra; Litwin* v. *Maddux, supra.*

Pharmaceuticals, Inc. v. *United Whelan Corp.*, 123 U. S. P. Q. 565 (Sup. Ct. N. Y. Co. 1959), also relied on by petitioner (Pet., p. 27), was a case applying the general rule that plaintiff may recover where he succeeds in showing a likelihood of confusion resulting from defendant's copying of the identifying features of his product and its

labeling. In that case the court enjoined defendant from selling its product "Somnifac", which incorporated "practically every feature which the public would be likely to recognize in plaintiff's product," Sominex (123 U. S. P. Q. at 566). The court pointed out that plaintiff's and defendant's pills were identical and that "the shape of the bottles and the colors used on the labels are virtually the same" (*Ibid.*). The court held "the proper test to be applied is whether the public is likely to be confused" (123 U. S. P. Q. at 567). The court concluded that such confusion was likely.

This is in sharp contrast to the comment of the Court of Appeals in the instant case that "it stretches credulity to imagine a purchaser confusing these disparate articles" (App. 21).

The Court of Appeals carefully considered the New York authorities. It correctly held that petitioner's failure to prove secondary meaning and its failure to prove likelihood of confusion were fatal to its case.

III.

There was no deviation from the requirements of Rule 52.

Petitioner finally suggests that in concluding that the pink color of Pepto-Bismol was non-functional the Court of Appeals improperly rejected a finding of the District Court to the contrary.

This Court, of course, will reach this issue only if it determines that the Court of Appeals must be reversed in its holding that a showing of secondary meaning was necessary. If such a showing was necessary and was not made, as the Court of Appeals held, then it makes no difference whether the pink color of petitioner's product was functional or not.

The handling by the Court of Appeals of the District Court's "conclusory finding" (App. 22) was unexceptionable.

The District Court specifically found that:

> "the pink color and the ingredient producing same have no healing value in themselves" (App. 10)
>
> (This was conceded by both parties.)
>
> "* * * [the color] is designed to present a pleasing appearance to the customer and to the sufferer" (*Ibid.*).
>
> "It is readily understood that a disordered stomach will accept that which is pleasing and reject that which is repulsive" (*Ibid.*).

The Court of Appeals accepted these findings (App. 22). Indeed there could be little dispute over these basic facts. The Court of Appeals rejected, however, the District Court's legal conclusion that the color was non-functional. The Court of Appeals concluded, on the contrary, that the legal effect of the facts found by the District Court was to make the color "functional" as that term is used in the law of unfair competition.

The Court of Appeals relied on the broad definition of the term "functional" in Section 742 of the *Restatement of Torts*. As the *Restatement* points out:

> "* * * the shape of a bottle or other container may be functional though a different bottle or container may hold the goods equally well" (Section 742, *Comment a*).

It is well recognized that where a color renders a product more attractive or desirable, it is "functional". *E.g., Campbell Soup Co.* v. *Armour & Co.*, 175 F. 2d 795, 798 (3d Cir. 1949), *cert. denied*, 338 U. S. 847; 3 Callman, *Unfair Competition and Trade-Marks* 1105 (2d ed. 1950).

Petitioner seeks to treat the pink color as "a preferred dress" or "a matter of personal preference" (Pet. p. 30).

This ignores the fact that pink has become the traditional color for this kind of remedy. In any event, a design, shape, color, or other feature may be functional even though some other configuration might also be used and might be preferred by some people.

It is well settled that the "clearly erroneous" standard of Rule 52 has no application to conclusions of law, to mixed questions of fact and law, or to determinations of the legal significance of evidentiary facts. *E.g., United States* v. *United States Gypsum Co.*, 333 U. S. 364, 396 (1948); *Lehmann* v. *Acheson*, 206 F. 2d 592, 594 (3d Cir. 1953); *Stevenot* v. *Norberg*, 210 F. 2d 615, 619 (9th Cir. 1954). Even if that standard were applicable, there would be ample justification for rejection of the District Court's conclusion here as "clearly erroneous".

Conclusion.

The decision of the Court of Appeals was based on a careful analysis of the New York and federal authorities and of the findings of the District Court. It is submitted that the decision was in all respects correct, and that the petition for certiorari should be denied.

Respectfully submitted.

JOHN T. CAHILL,
JAMES A. FOWLER, JR.,
63 Wall Street,
New York 5, New York,
Attorneys for Respondent.

DAVID RASCH,
JAMES S. KERNAN, JR.,
RAYMOND L. FALLS, JR.,
Of Counsel.

March 3, 1960.

APPENDIX

Opinion of U. S. Court of Appeals.

SPEEDRY PRODUCTS, INC.,
Plaintiff-Appellant,

v.

DRI MARK PRODUCTS, INC., SUBURBAN DYERS & FINISHERS, INC., MILTON DINOWITZ d b a Commodore Stationers, LANART ASSOCIATES, INC., MILTON LANDIN and ARTHUR S. ROMM,
Defendants-Appellees.

No. 335, DOCKET 25550.

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

Argued June 9, 1959.

Decided Nov. 6, 1959.

(271 Fed. 2d 646).

Before HINCKS and MOORE, Circuit Judges, and SMITH, District Judge.

MOORE, Circuit Judge.

Speedry Products, Inc., plaintiff-appellant (Speedry) appeals from an order denying its motion for a preliminary injunction by which it sought to enjoin defendants-appellees (collectively referred to as "Dri Mark") from importing, manufacturing and selling a marking device known as "Dri Mark" on the grounds that it infringed the patents on Speedry's device known as "Magic Marker" and that it

"is so similar in appearance to the 'Magic Marker' that it will deceive the public into thinking that it comes from the same source as the 'Magic Marker'." Upon argument of the motion Speedry for purposes of the preliminary injunction relied only upon its claim of unfair competition. The court, after comparing the two markers, found that because of readily recognizable differences "The likelihood of confusion as to source is, to say the least, extremely doubtful"; that to grant the injunction requested could secure for Speedry the most important part of the relief that it could receive after trial; and that there was no showing of irreparable damage.*

The amended complaint contained three causes of action: (1) patent infringement; (2) trademark infringement; and (3) unfair competition in that defendants' use of "Dri Mark" (an alleged copy of "Magic Marker"), its style, dress, container and packaging were "all so similar to the 'Magic Marker' as to mislead the public into believing that the 'Dri Mark' and the 'Magic Marker' are produced from the same source," and that the public would purchase "Dri Mark" in the erroneous belief that it was the "Magic Marker."

This allegation constitutes a good cause of action in the field of unfair competition known as "palming off" or "passing off." Traditionally this type of action has required proof that a fraud is being perpetrated, i. e., that the defendant is so foisting his product on the market that there is resulting confusion or likelihood of confusion as to its source in the mind of the buying public (1 Callman, Unfair Competition and Trade-Marks (Sec. Ed. 1950) (p. 40)).

In order to succeed in its application for a preliminary injunction Speedry must show at least a reasonable probability of success in its main action, *Chas. D. Briddell, Inc.* v. *Alglobe Trading Corp.*, 2 Cir., 1951, 194 F. 2d 416, and that irreparable damage would result from a denial of the motion, *Joshua Meier Company* v. *Albany Novelty Mfg.*

* A previous motion for a preliminary injunction had been denied with leave to renew. Dimock, D. J., Dec. 5, 1958.

Co., 2 Cir. 1956, 236 F. 2d 144. Although in advance of the trial no final conclusions can be stated as to the facts; nevertheless an initial survey must be made in order to determine whether Speedry is entitled to preliminary relief. "The critical question of fact at the outset always is whether the public is moved in any degree to buy the article because of its source and what are the features by which it distinguishes that source" (Briddell, *supra*, 194 F. 2d page 419).

The competing products are hand ink marking devices consisting basically of small glass bottles containing various colored inks which pass by capillary action to felt nibs in a small tube protruding from the bottle and thence to the desired writing or marking surface. The color of the ink can be identified by a matching colored cap located over the nib. Both products, plaintiff's "Magic Marker" and defendants' "Dri Mark," are generally similar as to size and shape. The size and shape of any hand marking device is necessarily limited. It must be small enough to be held in the hand; yet be large enough to contain a sufficient quantity of the marking fluid and be tapered enough to enable the writing point or wick to be comparatively sharp.

The scope of potential size and shape of a marking device is definitely limited by its function and is somewhat analogous to that of the fountain pen. It can scarcely be argued that the first producer of a fountain pen would have been entitled to a perpetual monopoly via the unfair competition route of its size and shape. Although use of such generic terms as "functional" and "non-functional" is likely to lead to oversimplification and arbitrary classification, size and shape of an article of the type of these marking devices are highly functional. The mere copying of functional features, absent some fraudulent factor, is not unlawful. A contrary holding would be an unwarranted extension of patent and copyright protection.

Speedry argues that the "New York courts have held that the law of unfair competition no longer requires that plaintiff establish a secondary meaning for its product or business" citing *Santa's Workshop* v. *Sterling*, 3rd Dept.

1953, 282 App. Div. 328, 122 N. Y. S. 2d 488, *Avon Periodicals* v. *Ziff-Davis Pub. Co.*, 1st Dept. 1953, 282, App. Div. 200, 122 N. Y. S. 2d 92, and *Oneida Ltd.* v. *National Silver Company*, Sup. Ct. Madison Co. 1940, 25 N. Y. S. 2d 271. Several recent federal cases are also said to support this proposition. Thus, Speedry, in effect, represents that a cardinal principle of unfair competition, i. e., secondary meaning, has been completely discarded and repudiated as a requisite factor. Analysis of the cases does not justify this conclusion.

In *Mastercrafters Clock & Radio Co.* v. *Vacheron & Constantin-Le C. W.*, 2 Cir., 1955, 221 F. 2d 464, it was the identity of appearance of the clocks which rendered the conduct actionable. In *Noma Lites* v. *Lawn Spray*, 2 Cir., 1955, 222 F. 2d 716, the advertising and packaging of the products were so similar "as to entitle the plaintiff under state law to protection even without a preliminary showing of secondary meaning." But even there the court did not repudiate this factor, saying "The time period necessary for a product to acquire a secondary meaning may be quite short" (at page 717) and expressed no opinion "as to whether on the actual trial such secondary meaning can or cannot be shown." Likelihood of deception was the basis of the decisions in *Fancee Free Mfg. Co.* v. *Fancy Free Fashions*, D. C. S. D. N. Y. 1957, 148 F. Supp. 825 and *Gaylord Products* v. *Golding Wave Clip Co.*, D. C. W. D. N. Y. 1958, 161 F. Supp. 746.

Assuming the applicability of the New York law (*Maternally Yours* v. *Your Maternity Shop*, 2 Cir., 1956, 234 F. 2d 538), an analysis of the New York cases does not bring forth the conclusion Speedry urges. *Santa's Workshop* v. *Sterling*, *supra*, first came before the Appellate Division on an appeal from an order denying a motion to dismiss the complaint for failure to state facts sufficient to constitute a cause of action. As clearly disclosed in the *per curiam* opinion, there was a sufficient unfair competition allegation in the complaint. However, from a single sentence in this brief *per curiam*, quite unnecessary to the decision, stem the arguments made subsequently that the law of unfair

competition has been radically changed in New York State. The two cases cited in support of the statement were *International News Service* v. *Associated Press*, 248 U. S. 215, 235, 237, 39 S. Ct. 68, 63 L. Ed. 211, and *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 36 S. Ct. 357, 60 L. Ed. 713. The *International News* case rose out of a unique set of facts dealing with two large organizations engaged as competitors in the gathering, distribution and publication of news in newspapers throughout the United States. Because of the complexity of the facts the case is *sui generis*. Even there the decision was based largely upon fraud, the court finding that "Besides the misappropriation, there are elements of imitation, of false pretense, in defendant's practices" (248 U. S. at page 242, 39 S. Ct. at page 73). In the *Hanover Star Milling* case the misappropriation of words was even more flagrant, both parties using "Tea Rose" as a brand of flour. There the court found that "the tendency of the similarity of the brand and accompanying design, and of the make-up of the packages, to mislead ultimate consumers, is so evident, that it seems to us a case of unfair competition is made out" (240 U. S. at pages 423-424, 36 S. Ct. at page 364).

On appeal from a judgment in the plaintiff's favor in *Santa's Workshop* v. *Sterling*, 3rd Dept. 1956, 2 A. D. 2d 262, 153 N. Y. S. 2d 839, the court affirmed but reduced the judgment, one judge dissenting and voting to dismiss. The facts showed such an obvious theft of the plaintiff's business ideas, physical layout and advertising that the fraudulent nature of the defendant's competition was most apparent. Here most probably was a good example of the creation of a "secondary meaning" within a short time—the possibility which this court pointed out in *Noma Lites* v. *Lawn Spray*, *supra*. The plaintiff in Santa's Workshop, in July 1949, had set up a public entertainment and sales facility on one of the Adirondack Mountains which he called "Santa's Work Shop." He established a village, centering around Santa, his home, his work shop, St. Nick's Chapel, and his friendly animals. The enterprise was extensively advertised and from the outset became highly successful. The defend-

ant, also in the Adirondack region, almost immediately thereafter (1950) changed his advertising to "See Santa's Friendly Animals" and by road signs indicated that here, too, Santa Claus had an abode. Since one of the main automobile roads passed one of the defendant's places of business en route to the plaintiff's needless to say, the defendant definitely played upon and capitalized upon the plaintiff's unique village and his advertising thereof. Because of these factors and the proximity of the two competing places of business, there would be good reason for a court of equity to restrain the defendant's conduct and little difficulty in holding that plaintiff's establishment could almost immediately acquire "secondary meaning" in the minds of the public traveling in that area. The decision, therefore, in favor of the plaintiff in that case could easily have been grounded on a finding that secondary meaning had been quickly acquired. In any event the facts clearly demonstrate the type of predatory business conduct that a court of equity will enjoin whether or not there has been a showing of secondary meaning.

Because of failure to recognize the distinctions between the palming off cases and the misappropriation cases, both of which categories are generally regarded as falling within the field of unfair competition, much confusion has crept into the state decisions[1] and thence into the federal decisions.[2] It is due to that confusion that courts occasion-

---

[1] Recovery allowed on theory of palming off without proof of secondary meaning: Avon Periodicals *v.* Ziff-Davis Pub. Co., 282 App. Div. 200, 122 N. Y. S. 2d 92; Catalina, Inc. *v.* Ganis, 207 Misc. 1068, 142 N. Y. S. 65; Murray *v.* Miller, Sup., 142 N. Y. S. 2d 857, modified 3 A. D. 2d 1008, 164 N. Y. S. 2d 257. Cf. Santa's Workshop *v.* Sterling, 282 App. Div. 328, 122 N. Y. S. 2d 488.

Proof of secondary meaning required: Maveo, Inc. *v.* Hampden Sales Association, 273 App. Div. 297, 77 N. Y. S. 2d 510; Herzman Scarfs *v.* Baar & Beards, Inc., 203 Misc. 449, 118 N. Y. S. 2d 380; American Merri-Lei Corp. *v.* Jet Party Favors, Sup., 123 N. Y. S. 2d 136. Cf. Pocket Books, Inc. *v.* Meyers, 292 N. Y. 58, 54 N. E. 2d 6.

[2] Cases containing holdings or dicta that proof of secondary meaning is not necessary in product copying cases: Noma Lites *v.* Lawn Spray, 2 Cir., 222 F. 2d 716; Upjohn Company *v.* Schwartz,

ally have said that secondary meaning is not a necessary factor without restricting that observation to the misappropriation cases in which recovery seems not to depend upon the confusion or deceit of the public. Thus in such of these misappropriation cases as did not involve a palming off, there was a certain logic in saying that proof of a secondary meaning for a plaintiff's service or product is not essential for recovery.

Guided by these principles the facts do not meet the standards necessary to support a preliminary injunction. An examination of the two markers shows that there is no such likelihood of confusion either as to source or as to the product as to justify preliminary relief. The coloring on the "Dri Mark" cover is quite distinct from the "Magic Marker"; the front of the "Magic Marker" is predominantly red with some black and white; the front of "Dri Mark" is predominantly white with some red. While the back of both markers is basically red lettering on a white background, there are marked differences between them; the lettering on "Dri Mark" is about half the size as on the "Magic Marker" and some of the lettering of the "Magic Marker" is in white contrasted against three wide red strips whereas the "Dri Mark" is solid white with the red letters. The lettering itself is substantially different. The trade names are prominently displayed on each. The words and their arrangement on the covers are quite distinct. Although both use the colored caps to identify the color of the ink in the bottle ("Magic Marker" has 9, "Dri Mark" has 12) Speedry's is long, narrow and made

---

2 Cir., 246 F. 2d 254, 261-262; Joshua Meier Co. v. Albany Novelty Mfg. Co., 2 Cir., 236 F. 2d 144, 148; Norwich Pharmacal Co. v. Sterling Drugs, Inc., D. C., 167 F. Supp. 427, appeal pending; Flint v. Oleet Jewelry Manufacturing Co., D. C., 133 F. Supp. 459.

Cases taking the position that proof of secondary meaning is necessary in product-copying cases: Chas. D. Briddell, Inc. v. Alglobe Trading Corp., 2 Cir., 194 F. 2d 416; Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, 2 Cir., 221 F. 2d 464; American Safety Table Co. v. Schreiber, 2 Cir., 269 F. 2d 255, 266; Kramer Jewelry Creations v. Capri Jewelry, D. C., 143 F. Supp. 120.

of metal, while "Dri Mark's" is wider, stubbier and made of plastic. The packaging is entirely different. The "Magic Marker" is placed in a cardboard container, twelve to a box, separated by an egg-type spacer. "Dri Mark" is placed in an individual container and six of these are then shipped in a packing carton. The wide price differential is also a significant factor. It is true that the proof indicates that a Speedry marker was sent to Japan for the purpose of having a similar marker made and produced there for sale in the United States. Production under different labor and living standards may well account for the wide price differential. However, it is not for the courts to pass upon the economic or public policy considerations of the situation but only upon the unfair competition aspects.

In addition, on an entirely separate ground the order below must be affirmed. Speedry failed to show that irreparable harm would result should the preliminary injunction be denied.

The order appealed from is affirmed.